Supreme Court, U.S.
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No. 06-557

In the
Supreme Court of the United States

URBAN BRANDS, INC.,

Petitioner,

v.

EVELYN RODRÍGUEZ-OQUENDO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Puerto Rico

REPLY BRIEF FOR PETITIONER

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page ii of the Petition. There have been no changes to Petitioner's status since the date of that statement.

TABLE OF AUTHORITIES

CASES

American Living System v. Bonapfel (In re All American of Ashburn, Inc.), 56 B.R. 186 (Bankr. N.D. Ga. 1986) 3, 4, 5

Back v. LTV Corp. (In re Chateugay Corp.), 213 B.R. 633 (S.D.N.Y. 1997) 4, 5

Citicorp Homeowners Services, Inc. v. Elliot (In re Elliot), 94 B.R. 343 (E.D. Pa. 1988) 5

Fairchild Aircraft, Inc. v. Cambell (In re Fairchild Aircraft Corp.), 184 B.R. 910 (Bankr. W.D. Tex. 1995) 5

In re James, 203 B.R. 449 (Bankr. W.D. Mo. 1997) 5

In re Kellstrom Industrial, Inc., 282 B.R. 787 (Bankr. D. Del. 2002) 5

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In re Trans World Airlines, Inc., 322 F.3d 283 (3d Cir. 2003) 2, 6

Western Automobile Supply Co. v. Savage Arms, Inc. (In re Savage Industrial, Inc.), 43 F.3d 714 (1st Cir. 1994) 4

Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159 (7th Cir. 1994) 5

STATUTES

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REPLY BRIEF FOR PETITIONER

Respondent does not dispute the existence of a deep conflict within the state and federal courts on the important question of federal law presented in the Petition – concerning a federal bankruptcy court's power, pursuant to Sections 363(f) and 105(a) of the federal Bankruptcy Code, 11 U.S.C. §§ 105(a), 363(f), to extinguish state and common law successor liability claims against purchasers of a debtor's assets. Nor does Respondent dispute that the resolution by the court below of the question presented was contrary to the federal bankruptcy order's plain language, and that the decision below undermines important federal statutory interests of maximizing the value of debtors' assets in order to further the interests of creditors and employees, maintaining the priority scheme of the federal Bankruptcy Code, ensuring national uniformity of bankruptcy laws, and integrating the Commonwealth of Puerto Rico into the national economy.

Instead, Respondent attempts to put forth three alternative procedural reasons – none of which has any merit – as to why the Petition should be denied. Respondent argues that: (1) Petitioner lacks standing in this matter, because an entity named "Urban Acquisition Corp." purchased the debtor's assets at issue; (2) Petitioner waived the defense that it purchased the debtor's assets "free and clear" of successor liability because it did not appear in the Court of First Instance prior to entry of a default judgment against the debtor; and (3) Respondent did not receive adequate notice of the proposed sale of the debtor's assets, and thus Section 363 does not apply by its own terms.

None of these contentions is valid and none provides a basis for denying the Petition. The Petition should be granted so that the Court may resolve the state and federal circuit court split of authority on the question presented.

1. ***Petitioner's Standing***. Respondent has "questioned [Petitioner's] standing to appear in this suit." (Resp. Br. at 3 n.1). But this Petition arises out of Respondent's attempt to attach assets *belonging to Petitioner*, *i.e.*, "a bank account in the name of '*Urban Brands, Inc., Marianne Division*.'" (Resp. Br. at 9 (emphasis in original).) Petitioner plainly has "standing" to seek to preserve its own bank account from attachment.

Although Respondent questions whether Petitioner (Urban Brands, Inc.) was the initial purchaser of the "Marianne Stores" (Resp. Br. at 9 (asserting that "Urban Acquisition Corp." was the "known purchaser")), the federal Bankruptcy Order, on its face, states that the *assets* (the subject of the bankruptcy sale) are purchased "free and clear of all Liens and Claims of any kind or nature, with all such Liens and Claims released, terminated and discharged as to [those] Assets." (App. E at 62a ¶ 8.) Because a Section 363(f) order permanently extinguishes any interest in the debtor's assets against any subsequent owner of such assets, *see In re Trans World Airlines, Inc.*, 322 F.3d 283, 289-90 (3d Cir. 2003), the issue of whether Petitioner was the initial purchaser or a subsequent assignee is not relevant to the question presented.

2. ***Asserted Waiver***. Respondent asserts that Petitioner "waived" its right to invoke federal bankruptcy law as a defense to enforcement of the judgment below because it failed to appear and assert the defense prior to the issuance of a default judgment against Petrie Retail (the debtor and prior owner of the assets of Marianne Stores). (Resp. Br. at 1, 12-13.) Even if, however, service of process against Petitioner can be deemed to have been properly made (an issue which the Commonwealth's courts did not resolve definitively), if the federal bankruptcy court's Section 363(f) order means what it says – *i.e.*, that any liabilities of Petrie Retail that might otherwise have been transferred to the purchaser of "Marianne Stores" are extinguished – then Petitioner cannot have waived

its rights by failing to answer a judicial summons that, as the record shows, was addressed exclusively to Petrie Retail. (*See* App. A at 2a-3a.) Nothing in the opinion of the court below supports the contrary view now advanced by Respondent.

In any event, the court below did not, *as a matter of state procedural law*, find that there had been any "waiver" precluding review of the federal law issue, and rested its decision upon the federal law issue. Accordingly, Respondent's waiver argument asserted under the procedural laws of the Commonwealth is not properly before this Court.

3. ***Adequate Notice of Bankruptcy Sale.*** Respondent asserts that Section 363(f) cannot apply because she "was never notified" of the proposed bankruptcy sale made "free and clear" of all liens and claims, as required by Section 363(b) of the Bankruptcy Code, 11 U.S.C. § 363(b). (Resp. Br. at 4.) Yet the federal Bankruptcy Order is predicated on an express finding that that "[t]he provisions of Sections 363(b), 363(f) and 365 have been complied with" and that "*[p]roper, timely and sufficient notice' was given "to all interested parties, including, but not limited to, (a) all parties who claim interests in or liens upon the Purchased Assets."* (App. E at 55a ¶ c (emphasis added).)

If the decision below is to interpreted as making a contradictory finding – as Respondent contends[1] – then the

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[1] In fact, the Supreme Court of Puerto Rico never ruled on the issue of whether the federal bankruptcy court's order complied with the notice requirement of Section 363(b). Instead, it ruled (incorrectly) that the Federal Bankruptcy Order was inherently incapable, under any circumstances, of extinguishing successor liability claims. (App. A at 15a.) Thus, its subsequent statement that "[Respondent] had no knowledge of the transfer of [Marianne Stores] to [Petitioner]" (*id.* at 17a) related not to the sufficiency of notice as a matter of federal bankruptcy law or to the validity of the Federal Bankruptcy Order under Section 363, but rather related solely to the *state law* question of whether the elements of the successor liability doctrine under Puerto Rico law had been satisfied. *Cf. In re All American of*

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decision below would constitute an impermissible collateral attack on a prior federal order. *See Back v. LTV Corp. (In re Chateugay Corp.)*, 213 B.R. 633, 637 (S.D.N.Y. 1997) ("'The ability collaterally to attack bankruptcy petitions in the state courts would also threaten the uniformity of federal bankruptcy law, a uniformity required by the Constitution'") (quoting *Gonzalez v. Parks*, 830 F.2d 1033, 1035 (9th Cir. 1987)); *American Living Sys. v. Bonapfel (In re All American of Ashburn, Inc.)*, 56 B.R. 186, 190 (Bankr. N.D. Ga. 1986) (propriety of bankruptcy sale order cannot be considered by subsequent court as this would be an improper "collateral attack"), *aff'd*, 805 F.2d 1515 (11th Cir. 1986); *In re Lewis Jones, Inc.*, 369 F. Supp. 111, 118 (E.D. Pa. 1973) ("The finality of a Bankruptcy Court sale is not subject to inquiry or impeachment in any collateral proceeding.") (citing *Slocum v. Edwards*, 168 F.2d 627 (2d Cir. 1948)).[2]

Likewise unavailing is Respondent's attempt to challenge the validity of the federal Bankruptcy Order, by claiming that the statutory pre-requisites of Section 363(f)(1) of the Bankruptcy Code, 11 U.S.C. § 363(f)(1), were not met. As a threshold matter, this assertion is contradicted by the finding within the federal Bankruptcy Order that "*[t]he provisions of Section[] . . . 363(f) have been complied with and are*

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Ashburn, 56 B.R. at 190 ("The Court will, however, consider the issue of notice to the [successor liability claimants] to the extent that it may be relevant to the successor liability doctrine [under Georgia law].").

[2] Respondent's reliance on *Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714 (1st Cir. 1994) (Resp. Br. at 4 n.2), is misplaced. In that case, unlike here, the First Circuit had direct appellate review over the bankruptcy court's sale order and to determine the issue of whether all affected parties had sufficient prior notice of the proposed Section 363(f) order. *See* 43 F.3d at 716, 721-23. By contrast, here, that determination was solely a matter for the federal bankruptcy court and for the courts directly reviewing the federal bankruptcy order, not for collateral review by the courts of the Commonwealth of Puerto Rico.

applicable as to the Purchased Assets." (App. E at 56a § e (emphasis added).) Respondent is precluded from challenging this finding in a subsequent state proceeding. *See Chateugay Corp.*, 213 B.R. at 637-38; *All American of Ashburn*, 56 B.R. at 190.

In all events, Respondent's attack on the propriety of the federal Bankruptcy Order approving the sale of the debtor's assets "free and clear" of all claims and liens is premised on the fallacious argument that "[a]ccording to 11 USC § 363(f) all five criteria [*i.e.*, each of sub-paragraphs (1) through (5) of 11 U.S.C. 363(f)] have to be met in order for the sale to proceed." (Resp. Br. at 4 n.4.) On the contrary, it has been universally held that:

> [Section 363(f)] is written in the disjunctive, not the conjunctive. Therefore, if any of the five conditions of § 363(f) are met, the Trustee has the authority to conduct the sale free and clear of all liens.

Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot), 94 B.R. 343, 345 (E.D. Pa. 1988); *accord, e.g., In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002); *In re James*, 203 B.R. 449, 454 (Bankr. W.D. Mo. 1997).[3]

Finally, as demonstrated in the Petition, Respondent's damages claim easily satisfies Section 363(f)(5), 11 U.S.C. §

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[3] *Fairchild Aircraft, Inc. v. Cambell (In re Fairchild Aircraft Corp.)*, 184 B.R. 910 (Bankr. W.D. Tex. 1995), *vacated*, 220 B.R. 909 (Bankr. W.D.Tex. 1998) (Resp. Br. at 4 n.4) does not support Respondent's contention that sub-paragraphs (1) through (5) of Section 363(f) should be read conjunctively. *Fairchild Aircraft* merely holds, citing, *inter alia*, *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994), that the *introductory* words of Section 363(f) (referring to a sale free of "interests" in the bankrupt property) should be read narrowly. *See Fairchild Aircraft*, 184 B.R. at 918-19. Far from supporting Respondent's position, this holding (and *Fairchild Aircraft's* reliance on *Zerand*) further illustrates the continuing circuit and state court split already identified in the Petition. (*See* Pet. at 9-15.)

363(f)(5), because she could have been "compelled" to accept a compromise of that claim upon a liquidation of Petrie Retail. *See Trans World Airlines*, 322 F.3d at 290-91. (*See also* Pet. at 11 n.3.) Accordingly, Respondent's collateral attacks on the validity of the federal Bankruptcy Order approving of the sale "free and clear" of all successor liability claims are unavailing.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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